Rokiah bt Mhd Noor v Menteri Perdagangan Dalam Negeri, Koperasi & Kepenggunaan Malaysia & Ors and another appeal

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NOS R2-25–36–02 OF 2013 AND R2-25–97–05 OF 2013
ABU BAKAR JAIS JC
11 JUNE 2015

Administrative Law — Judicial Review — Application for — Review of process by which Companies Commission of Malaysia ('the CCM') arrived at its decision — Whether writing and issuance of letter by applicants serious breach of discipline — Whether both process in arriving at decision and decision itself should be proven to be justified — Whether charges vague and ambiguous — Whether action taken by CCM unfair and contrary to s 10(3) of the WPA — Whether there was procedural unfairness or bias

Rokiah bt Mhd Noor and Azryain bin Borhan ('the applicants'), were at all material times employed as the Deputy Chief Executive Officer (Operations) and Director of Training Academy respectively of the Companies Commission of Malaysia ('the CCM'). Both applicants had decided to write a letter entitled 'Integrity and Leadership Crisis in the CCM' ('the letter') that was addressed to the chairman and the board members of the CCM, which discussed their version of the state of affairs in the CCM. Upon receipt of the letter, the CCM held a special commissions meeting wherein it was resolved that the CCM's CEO would investigate the issues alleged in the letter. At the close of the investigation the CEO found that the allegations made in the letter were unproven and that the writing and issuance of the letter was a serious breach of discipline. This letter then became the basis of the disciplinary action taken against both applicants. A four member disciplinary secretariat ('DS') was formed to conduct the disciplinary proceedings against the applicants. After due deliberation the DS was of the view that the conduct of the applicants ought to be classified under the 'serious punishment' category and accordingly two charges were preferred against each of the applicants. The applicants issued their respective written representations against the two charges. Thereafter the applicants' cases were referred to the investigation committee ('IC'), which found that the applicants had not been able to justify why they had issued the letter to third parties. Based on the findings of the IC, the DS unanimously decided that both applicants were guilty of the charges against them. The Chairman of the DS thereafter recommended that the first applicant, ie Rokiah be dismissed and the second applicant, ie Azryain be demoted by one grade. The applicants filed two separate applications for judicial review, which were

heard together. The applicants contended that both the process by which the CCM arrived at its decision and the decision itself could be meaningfully challenged. The applicants challenged the process by submitting inter alia that the charges proffered against both of them were vague, prejudicial and defective and that the CCM had not conducted an investigation into the allegations raised in the letter thereby rendering the allegations to be true. The applicants also contended that they had written the letter with the best interest of CCM in their minds and had only meant for the CCM to redress some of the damaging events happening at their place of work. As such, they argued that the action taken by the CCM against them was not only unfair, perverse and irrational but also contrary to s 10(3) of the Whistleblower Protection Act 2010 ('the WPA'). The applicants also disputed the classification of their case as serious punishment cases and argued that they should not have received different punishments, namely dismissal in the case of Rokiah and demotion in the case of Azryain, for the same offence.

Held, dismissing the applications:

(1) The appellants were right in their contention that not only the process of decision making by the CCM but also the decision finding the applicants guilty could be challenged. There are numerous cases, which have unequivocally decided that both the process in arriving at the decision and the decision itself must be proven to be justified. Bearing in mind the high stake upon which the fate of the applicants would be determined, it would be more prudent and fair to adopt the more stringent requirement that not only the process but also the decision itself should be subjected to judicial review, in order to uphold a disciplinary action (see paras 25–26, 28 & 77).

(2) The charges had more than sufficient particulars for the applicants to understand what they were facing and what they needed to prepare in meeting the same. The reference to the applicants' letter, which was the subject matter of the charge against the applicants, was clearly stated in the charges. This reference to the letter made the applicants sufficiently aware that the crux of the offence levelled against them related to the letter. Therefore, there was no basis for the applicants to suggest that the charges were vague and ambiguous and that they could not appreciate the charges they were facing (see para 31).

(3) Despite submitting that the charges against them were vague, the applicants were able to identify and elaborate on the three elements of the charges against them. Even taking into account these three elements as argued by the applicants it was clear that these three elements were proven to the satisfaction of the DS. Further there could be little doubt that the allegations contained in the letter were serious in their implication and had cast negative impression on the CCM. It was also

undeniable that the applicants has acted irresponsibly in writing the letter without according a right of reply to those accused in the letter (see paras 32–35).

(4) Although the applicants claimed there was no investigation into the allegations raised in the letter, the evidence showed that an investigation had been undertaken by the CCM. The investigation found the allegations raised by the applicants in the letter to be unproven and there were no reasons to disturb the determination of the CEO of the CCM that the allegations contained in the letter were baseless and unfounded (see paras 38–39).

(5) When the whole of the provisions of the WPA are considered, it would become apparent that the protection afforded by ss 10(1) or (3) of the WPA did not mean that the whistleblower was granted a *carte blanche* to say whatever he or she wanted. They were still subjected to the requirement of justifying cogently the truth of the statements made. Thus, ss 10(1) or (3) of the WPA could not protect the applicants from disciplinary proceedings being commenced against them under the circumstances of this case (see para 44).

(6) The disciplinary proceedings taken by the CCM as the applicants' employer were not flawed merely because there was no formal complaints against the applicants (see paras 46–48).

(7) The applicants' allegations of procedural unfairness on the grounds that there should have been reasons made by the CCM in respect of the decisions made against them had no merit. Both the Minister and the CCM had no obligations in respect of giving reasons for their actions. In any case, more than sufficient reasons were provided by the DC and the IC in their written grounds for the decisions made (see paras 49–51).

(8) There was no conflict of interest in the present case as the CEO was not involved in the entire disciplinary process. Further, the applicants had not satisfied the evidential burden of proving bias. In fact, the applicants had run short in proving their case for judicial review (see paras 53–54 & 77).

(9) The DC had the power as well as the duty to categorise the case as 'serious punishment' or 'less serious punishment' without the need to inform the applicants as to why it had done so (see para 62).

(10) As to the punishments meted out to the applicants, the different positions held by the two applicants at the place of their employment were matters within the purview of the DC to consider in suggesting the appropriate punishments (see paras 66–67).

[Bahasa Malaysia summary

Rokiah bt Mhd Noor and Azryain bin Borhan ('pemohon tersebut'), adalah pada setiap masa matan bekerja masing-masingnya sebagai Timbalan Ketua Pegawai Eksekutif (Operasi) dan Pengarah Akademi Latihan Suruhanjaya Syarikat Malaysia ('SSM'). Kedua-dua pemohon tersebut telah membuat keputusan untuk menulis sepucuk surat bertajuk 'Integrity and Leadership Crisis in the CCM' ('surat tersebut') yang ditujukan kepada pengerusi dan ahli-ahli lembaga SSM, yang membincangkan versi mereka tentang kedudukan urusan dalam SSM. Setelah menerima surat tersebut, SSM telah mengadakan mesyuarat suruhanjaya khas di mana ia telah diputuskan bahawa KPE SSM akan menyiasat isu-isu yang didakwa dalam surat tersebut. Di penutup siasatan itu KPE mendapati bahawa dakwaan-dakwaan yang dibuat dalam surat tersebut tidak dibuktikan dan bahawa penulisan dan pengeluaran surat tersebut merupakan pelanggaran tatatertib yang serius. Surat tersebut kemudian menjadi asas tindakan tatatertib terhadap kedua-dua pemohon tersebut. Satu empat ahli sekretariat tatatertib ('ST') telah dibentuk untuk menjalankan prosiding tatatertib terhadap pemohon tersebut. Selepas pertimbangan sewajarnya dibuat ST berpendapat bahawa perlakuan pemohon tersebut patut diklasifikasikan di bawah kategori 'serious punishment' dan sewajarnya dua pertuduhan telah dibuat terhadap setiap pemohon tersebut. Pemohon tersebut telah mengeluarkan representasi bertulis mereka terhadap kedua-dua pertuduhan itu. Berikutan itu kes-kes pemohon tersebut telah dirujuk kepada jawatankuasa siasatan ('JS'), yang mendapati bahawa pemohon-pemohon tidak dapat menjustifikasikan kenapa mereka telah mengeluarkan surat tersebut kepada pihak ketiga. Berdasarkan penemuan JS itu, ST telah sebulat suara memutuskan bahawa kedua-dua pemohon tersebut bersalah atas pertuduhan-pertuduhan terhadap mereka. Pengerusi ST kemudian mensyorkan agar pemohon pertama, iaitu Rokiah dipecat dan pemohon kedua, iaitu Azryain diturunkan pangkat satu gred. Pemohon tersebut telah memfailkan dua permohonan berasingan untuk semakan kehakiman, yang tleah didengar bersama. Pemohon tersebut berhujah bahawa kedua-dua proses yang mana SSM telah tiba kepada keputusannya dan keputusan itu sendiri boleh dicabar. Pemohon tersebut telah mencabar proses itu dengan mengemukakan, antara lain, bahawa pertuduhan-pertuduhan yang dibuat terhadap kedua-dua mereka adalah tidak jelas, bersifat prejudis dan cacat dan bahawa SSM tidak menjalankan siasatan ke atas dakwaan-dakwaan yang ditimbulkan dalam surat tersebut yang menjadikan dakwaan-dakwaan itu adalah benar. Pemohon tersebut juga berhujah bahawa mereka telah menulis surat tersebut demi kepentingan SSM dalam minda mereka dan hanya bermaksud untuk SSM membetulkan kejadian-kejadian yang menjejaskan di tempat kerja mereka. Oleh itu, mereka berhujah bahawa tindakan yang diambil oleh SSM terhadap mereka bukan sahaja tidak adil, tidak munasabah dan tidak rasional tetapi juga bertentangan dengan s 10(3) Akta Perlindungan Pemberi Maklumat 2010 ('APPM'). Pemohon tersebut juga mempertikaikan

klasifikasi kes mereka sebagai kes hukuman serius dan berhujah bahawa mereka tidak patut menerima hukuman berbeza, iaitu pemecatan dalam kes Rokiah dan penurunan pangkat dalam kes Azrayain, untuk kesalahan yang sama.

Diputuskan, menolak permohonan-permohonan:

(1) Perayu-perayu adalah betul dalam hujah mereka bahawa bukan sahaja proses membuat keputusan oleh SSM tetapi juga penemuan keputusan yang pemohon tersebut bersalah boleh dicabar. Terdapat pelbagai kes, yang jelas memutuskan bahawa kedua-dua proses untuk tiba kepada keputusan itu dan keputusan itu sendiri hendaklah dibuktikan wajar. Dengan mengambil kira risiko nasib pemohon tersebut ditentukan, ia lebih wajar dan adil untuk menggunakan keperluan yang lebih ketat bahawa bukan sahaja proses itu tetapi juga keputusan itu sendiri yang patut tertakluk kepada semakan kehakiman, bagi tujuan mengesahkan tindakan tatatertib (lihat perenggan 25–26, 28 & 77).

(2) Pertuduhan-pertuduhan itu mempunyai butiran yang lebih daripada mencukupi untuk pemohon tersebut memahami apa yang mereka hadapi dan apa yang mereka perlukan untuk bersedia dengan keadaan tersebut. Rujukan kepada surat pemohon tersebut, yang menjadi hal perkara pertuduhan terhadap pemohon tersebut, dengan jelas dinyatakan dalam pertuduhan-pertuduhan tersebut. Rujukan ini kepada surat tersebut menjadikan pemohon tersebut amat menyedari inti pati kesalahan yang dikenakan terhadap mereka berkaitan surat tersebut. Oleh itu, tiada asas untuk pemohon tersebut mencadangkan bahawa pertuduhan-pertuduhan itu adalah tidak jelas dan taksa dan bahawa mereka tidak memahami pertuduhan-pertuduhan terhadap mereka (lihat perenggan 31).

(3) Walaupun dengan menghujahkan bahawa pertuduhan-pertuduhan terhadap mereka adalah tidak jelas, pemohon tersebut dapat mengenal pasti dan menghuraikan tiga elemen pertuduhan-pertuduhan terhadap mereka. Jikapun mengambil kira tiga elemen tersebut sebagaimana dihujahkan oleh pemohon tersebut ia adalah jelas bahawa tiga elemen itu telah dibuktikan dan meyakinkan ST. Selanjutnya mungkin terdapat sedikit keraguan bahawa dakwaan-dakwaan yang terkandung dalam surat tersebut adalah serius kesannya dan memberi tanggapan negatif pada SSM. Ia juga tidak boleh dinafikan bahawa pemohon tersebut telah bertindak tidak bertanggungjawab dengan menulis surat tanpa memberi hak menjawab kepada mereka yang dituduh dalam surat tersebut (lihat perenggan 32–35).

(4) Walaupun pemohon tersebut mendakwa tiada siasatan terhadap dakwaan yang timbul dalam surat tersebut, keterangan menunjukkan bahawa satu siasatan telah dijalankan oleh SSM. Siasatan itu mendapati dakwaan yang ditimbulkan oleh pemohon tersebut dalam surat tersebut

tidak dibuktikan dan tiada sebab untuk mengganggu penentuan KPE SSM bahawa dakwaan-dakwaan yang terkandung dalam surat tersebut adalah tidak berasas (lihat perenggan 38–39).

(5) Apabila keseluruhan peruntukan APPM dipertimbangkan, ia menjadi nyata bahawa perlindungan yang diberikan oleh ss 10(1) atau (3) APPM tidak bermaksud bahawa pemberi maklumat diberikan *carte blanche* untuk mengatakan apa pun yang diingininya. Mereka masih tertakluk kepada keperluan menjustifikasikan dengan yakin kebenaran kenyataan yang dibuat. Oleh itu, ss 10(1) atau (3) APPM tidak boleh melindungi pemohon tersebut daripada prosiding tatatertib yang dimulakan terhadap mereka di bawah keadaan kes ini (lihat perenggan 44).

(6) Prosiding tatatertib yang dimulakan oleh SSM sebagai majikan pemohon tersebut tidak cacat hanya kerana tiada aduan rasmi terhadap pemohon tersebut (lihat perenggan 46–48).

(7) Dakwaan pemohon tersebut tentang ketidakadilan prosedur atas alasan bahawa sepatutnya terdapat sebab yang dibuat oleh SSM berkaitan keputusan yang dibuat terhadap mereka adalah tanpa merit. Kedua-dua Menteri dan SSM tiada obligasi berkenaan memberi sebab untuk tindakan mereka. Dalam apa keadaan pun, sebab yang lebih daripada mencukupi telah dikemukakan oleh ST dan JS dalam alasan bertulis mereka untuk keputusan yang dibuat (lihat perenggan 49–51).

(8) Tiada konflik kepentingan dalam kes ini kerana KPE tidak terlibat dalam keseluruhan proses tatatertib. Selanjutnya, pemohon tersebut tidak memenuhi beban keterangan untuk membuktikan berat sebelah. Bahkan, pemohon tersebut tidak membuktikan kes mereka untuk semakan kehakiman (lihat perenggan 53–54 & 77).

(9) ST mempunyai kuasa dan juga kewajipan untuk mengkategorikan kes sebagai 'serious punishment' atau 'less serious punishment' tanpa perlu memaklumkan pemohon tersebut kenapa ia perlu dilakukan sedemikian (lihat perenggan 62).

(10) Berhubung hukuman yang diputuskan terhadap pemnohon tersebut, jawatan berbeza yang dipegang oleh kedua-dua pemohon tersebut di tempat pekerjaan mereka adalah perkara-perkara dalam skop ST untuk diambil kira dalam mencadangkan hukuman yang sesuai (lihat perenggan 66–67).]]]]

Notes

For cases on application for judicial review, see 1(1) *Mallal's Digest* (5th Ed, 2015) paras 312–342.

Cases referred to

Harbhajan Singh v Suruhanjaya Pasukan Polis Malaysia & Anor [2002] 3 MLJ 714; [2002] 4 CLJ 85, CA (refd)

Kerajaan Malaysia & Ors v Tay Chai Huat [2012] 3 MLJ 149; [2012] 3 CLJ 577, FC (refd)

Locabail (UK) Ltd v Bayfield Properties Ltd [2000] 2 WLR 870, CA (refd)

Michael Lee Fook Wah v Minister of Human Resources Malaysia & Anor [1998] 1 MLJ 305, CA (not folld)

Padfield and Others v Minister of Agriculture Fisheries and Food and Others [1968] 1 All ER 694, HL (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147, FC (folld)

Tan Tek Seng v Suruhanjaya Pendidikan [1996] 1 MLJ 261, CA (refd)

Zakaria bin Abdul Rahman v Ketua Polis Negara Malaysia & Anor [2001] 3 MLJ 385, HC (refd)

Legislation referred to

Companies Commission of Malaysia Act 2001 s 11, 11(1)(b)

Statutory Bodies (Discipline And Surcharge) Act 2000 regs 33, 33(1), 35(2), (2)(a), Second Schedule

Whistleblower Protection Act 2010 s 10(1), 10(3)

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Abu Bakar Jais JC:

INTRODUCTION

[1] The applicants filed two separate applications for judicial review. Both were heard together. In the first case the applicant is Rokiah bt Mhd Noor ('Rokiah') while in the second case the applicant is Azryain bin Bohan ('Azryain'). In both cases the respondents are the same – Minister of Domestic Trade, Co-operatives and Consumerism ('Minister'), Companies Commission of Malaysia ('CCM'), Ministry of Domestic Trade, Co-operatives and Consumerism ('Ministry') and Government of Malaysia ('Government'). Disciplinary actions taken against both by CCM, their employer and the ensuing punishment for the disciplinary actions are the basis for the applications for judicial review.

BACKGROUND FACTS

[2] Rokiah was at all material times the Deputy Chief Executive Officer (Operations) while Azryain was the Director of Training Academy of CCM. In a joint effort both decided to co-author the earnest worded letter dated 25 October 2011, no less entitled 'INTEGRITY AND LEADERSHIP CRISIS IN THE COMPANY COMMISSION OF MALAYSIA'. This letter was addressed to the chairman and board members of CCM. Both also thought it fit to carbon copy the letter to the highest level. For their piece, the Prime Minister, Deputy Prime Minister, Chief Secretary to the Government, Minister of Domestic Trade, Co-operatives and Consumerism, Chief Commissioner of the Malaysian Anti-Corruption Commission ('MACC') and Director of Investigation of MACC were all requested to give a thought on what they had penned regarding their version of the state of affairs at their office.

[3] This letter became the basis of the disciplinary actions against both of them. For ease of reference and a better understanding of the case as a whole, the letter is needed to be reproduced in full as follows:

> Dear commission Members of the Companies Commission of Malaysia,
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> RE: INTEGRITY AND LEADERSHIP CRISIS IN THE COMPANY COMMISSION OF MALAYSIA
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> 1. As Muslims, Malaysian citizens and members of the Companies Commission of Malaysia (SSM) Management, we would like to raise our concerns on the latest developments occurring within this beloved organization. The various incidents which have occurred or are still occurring have already cast negative impact to the organization, the Government and the country as a whole. This disclosure is made in good faith and in the interest of the organization, the Government, the country and Rakyat as a whole. This letter is submitted to the list of recipients above and is not intended for circulation to any third parties.
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> 2. As many of us already aware, Malaysia is currently gearing up towards achieving Vision 2020, that is the status of high income developed nation. As an agency which is tasked with inter alia the incorporation of companies, registration of businesses, administration of prescribed laws and regulations, regulate matters pertaining to companies and businesses, supplies corporate information and promote corporate governance, SSM possesses strategic roles in the country's economy.
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> 3. The New Economic Model (NEM) and the Tenth Malaysia Plan (RMK10) has called for the transformation of the public service and Government agencies. Chapter 7 of the RMK10 for example has inter alia outlined the need for the public service to transform and uphold the 4 principles of the Malaysian Government namely:
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> (i) Delivery through creativity and innovation – this aspect is crucial to allow the public service to respond to a dynamic global environment;

(ii) Emphasizes on speed of decision-making and execution – the need to make speedy decisions while exercising fact-based and sound judgment;

(iii) Delivers value-for-money – wastage and mismanagement of public finances will be eliminated to ensure every Ringgit is well spent. This is critical especially in a tight fiscal environment;

(iv) Upholds the highest level of integrity – the need for the Government to possess the highest standards of ethical conduct and good governance to uphold the highest level of integrity and practice 'zero tolerance' on corruption.

In addition, the RMK10 also calls for members of the public service to possess high competency, transparency and accountability in the performance of their functions.

4. A series of events which have unfolded especially in the past few months reveal a very serious integrity and leadership crisis within the organization. They directly strike against the core philosophies enumerated in Chapter Z of the RMK10 pertaining to integrity as well as the Government's drive to combat corruption under the Second National Key Result Area (NKRA). The systemic effect of lack of integrity would definitely thwart the Government's mission to achieve the desired state of economy. In our view, weak organizational leadership has catalyzed many integrity related issues in SSM. As such, we humbly plead that the Commission Members and the Government of Malaysia to urgently look into the various allegations made herein and thereafter, take the necessary action.

5. We are aware that there is currently a concerted effort which tantamount to a conspiracy of the highest order to install Puan Zahrah Abdul Wahab Fenner (Puan Zahrah Fenner), the Deputy Chief Executive Officer (Services) [DCEO Services] as the next Chief Executive Officer of SSM. Firstly, we would like to state that Puan Zahrah Fenner is not qualified to hold such position pursuant to the following:

(i) Inability to fulfil the requirements of paragraph 11(1)(a) of the companies commission of Malaysia Act 2001 (CCM Act 2001) which states as follows:

The Minister shall appoint–

(a) A person who is a qualified person as defined in the Legal Profession Act 1976 who possess relevant knowledge or experience in commercial or company matters to be the Chief Executive Officer of the Commission ...,

While Puan Zahrah Fenner certainly does not qualify under the first limb, she will justify her appointment under the second limb of the provision. We submit that her level of knowledge and experience is grossly insufficient to qualify her to be appointed under the second limb. The onus to satisfy the requirements under the second limb is on part of the proposed candidate, which the Honourable Minister must be satisfied of their presence. Based on our observation, Puan Zahrah Fenner severely lacks the knowledge on commercial and company matters as she has been throughout her entire career a Government servant The provision calls for someone with the 'relevant knowledge or experience in commercial or company matters' to be appointed instead of merely having some

basic knowledge on accounting. Accounting forms only a small portion of the knowledge on commercial or company matters. A unique combination of business acumen, product development, the economy, related corporate laws, regulations, policies, strategic management and planning, corporate governance, corporate responsibility, risk management, human capital management and more importantly, leadership qualities and integrity are required. Puan Zahrah Fenner's experience as a Government accountant and scant knowledge of matters pertaining to commercial matters and companies as well as her severe lack of successful track records in SSM as such will not qualify her to be appointed as the CEO of SSM.

(ii) Puan Zahrah Fenner severely lacks the necessary knowledge, management and leadership skills even in her existing capacity as a Deputy CEO.

It is common knowledge that while she was supervising the running of the Corporate Development & Policy Division (CDPD), she barely gave the necessary instructions and guidance with regard to the running of the Division. She almost never reverted for key instructions, leaving the Director of CDPD to take instructions directly from the CEO of SSM most of the time. Her gross absence of knowledge on matters pertaining to the laws administered by SSM, Government and institutional policies, corporate governance, corporate responsibility and strategic management had impaired her from coming up with the necessary instructions. As a result, a portfolio switch took place in early 2010 where CDPD was placed under the supervision of the Deputy CEO operations, Puan Hjh Rokiah Mhd Noor. Puan Zahrah Fenner is only famously known as an event organizer, preferring instead to be involved in relatively trivial and non-strategic pursuits of the organizations.

The latest evidence of her inability to lead and manage is the failure of the MyColD project. Upon the switch of portfolio, Puan Zahrah Fenner was given the task to take charge of SSM's ICT Division. She had failed to effectively monitor the development of the MyColD, which is managed by Khuzairi Yahaya, the Director of the ICT Division. As a result, to date, the MyColD system has yet to be successfully rolled out Puan Zahrah Fenner and Khuzairi Yahaya together with Dato' Azmi Ariffin had failed to disclose the fact that when the system RM9 million. Puan Zahrah Fenner had instructed for a board paper to be was launched in October 2010, there was no system developed. Attempts to develop and roll out the system were met with failures and glitches. Recently, the Malaysian Administrative Modernisation and Management Planning Unit (MAMPU) had upon the instructions of Y. Bhg. Tan Sri Chief Secretary had come to SSM inspect the progress of the MyColD system. The inspection was pursuant to the delay in the deployment of the MyColD system. MAMPU had made numerous shocking discoveries. In a nutshell, SSM has lied to the Prime Minister, the Government and the rakyat with regard to MyColD. In this regard, we fear that the commission Members would also be implicated pursuant to the absence of disclosure on part of SSM Management.

(iii) Lack of integrity

This represents as the main objection to Puan Zahrah Fenner's appointment as the CEO of SSM. Currently, Puan Zahrah Fenner is being investigated by the

Malaysia Anti Corruption Commission (MACC) for several alleged transgressions involving overseas travels and procurements, the details of which are not privy to our knowledge. Several others are also being investigated such as Amir Ahmad, the Director of Corporate Resources Division (CRD), Khairudin Rusli, the state Director of Negeri Sembilan and an executive officer also from Amir Ahmad's Division. However, we are sad upon knowing the lackadaisical attitude of the CEO, Dato' Azmi Ariffin with regard to the investigation. He had even resorted to advice/help Puan Zahrah Fenner to prepare and collect the necessary documents within 5 days upon being notified of such investigation by MACC. This in our view tantamount to rendering assistance to Puan Zahrah Fenner and interfering in MACC's course of investigations, in doing so, even the integrity of the CEO can be questioned.

From such facts mentioned above, it begs the question as to why Dato' Azmi Ariffin is 'assisting' Zahrah Fenner. The events which preceded a few months before the MACC investigation as such is very relevant and may perhaps shed some light. Dato' Azmi Ariffin is indebted to Zahrah Fenner at least on 2 separate occasions namely:

> [95] The procurement of a Toyota Fortuner at a price of RM10,000 without going through a tender process. We were made to understand at the time of such disposal, the value of the vehicle exceeded RM150,000. Puan Zahrah Fenner had made it possible for such procurement to occur as she is controlling SSM's financial affairs; and
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> [95] The transportation of the furnitures in Dato' Azmi Ariffin's room at SSM's previous headquarter in Putra Place to his home in Keiantan, The furnitures were purchased prior to the movement of SSM's current headquarters to Kuala Lumpur Sentral. Upon such purchase, Puan Zahrah Fenner had 'helped' to transport such items on SSM's expenses.

In doing all the above, Puan Zahrah Fenner has cunningly entrapped Dato' Azmi Ariffin, making him obliged to 'return' such favour whenever required by Puan Zahrah Fenner. Any refusal would result in Puan Zahrah Fenner exposing such transactions, to the detriment of the CEO.

Other transactions which invite the question of Puan Zahrah Fenner's integrity involves her various overseas trip. One involves her trip to Belgium sometime last year to study the parking system there. She was accompanied by Puan Alfah. We find the justifications for such trip to be extremely ridiculous and wholly unnecessary. The trip was sponsored by Semasa Sentra/UEM. Semasa Parking is currently the contractor engaged to manage the parking at SSM headquarters in KL Sentral. Puan Zahrah Fenner had also joined another trip which was sponsored by Puncak Semangat. The trip was made on the pretext of an understudy with regard to the development of My ColD. The trip was made to either San Francisco or London (we are not sure the exact destination) where she was accompanied by the Director of ICT, Khuzairi Yahaya.

Sometime in 2007 when the former CEO of SSM, Datuk Abdul Karim Abdul Jalil, was performing his Hajj, Puan Zahrah Fenner took the opportunity to engage her nephews, the KPU brothers to undertake the production of SSM

corporate video. We were made to understand that there were also other numerous transactions involving the KRU brothers which were made by Puan Zahrah Fenner.

Puan Zahrah Fenner was also responsible in misutilizing and profiteering from SSM's premises nationwide for the benefits of Koperasi SSM. In this regard, SSM has entered into an arrangement with Alliance Bank for the utilization of SSM's premises for their business purposes. The specific space allocated were used to operate ad-hoc counters which offers credit services. The rental of such space would then be deposited into Koperasi SSM's account. Likewise, Puan Zahrah Fenner was also instrumental in diverting the revenue generated through the sale of company seal, statutory books and share certificates into the account of Koperasi SSM. Puan Zahrah Fenner is currently serving Koperasi SSM as the head together with a few of his close associates from the CRD which include Amir Ahmad. As usual, she would contend that she had already obtained the consent in writing from the CEO, Dato' Azmi Ariffin to do so. Again, Dato' Azmi Ariffin is entrapped.

Dato' Azmi Ariffin is too weak to prevent Puan Zahrah Fenner from committing numerous misdeeds. In addition, the various entrapments set by Puan Zahrah Fenner have been very successful, making the CEO tight-tipped and acting only as spectator in allowing her to manipulate him and SSM to her advantage. A clear example as to how weak Dato' Azmi Ariffin is with regard to the proposed purchase of a plot of land in Kuching, Sarawak by SSM at a price of approximately tabled at a management meeting in 2011 without obtaining the approval from the CEO, much less discussing the proposal with the Management. Dato' Azmi Ariffin was unaware of such paper until it was despatched to the Commission Members. He was helpless to prevent such paper from being circulated. Fortunately, the proposal to purchase the land was turned down by the Commission Members. The circumstances surrounding such purchase was also extremely suspicious.

6. Sometime in July 2010, a transfer order was issued in respect of 6 individuals namely Roslan Hussain, the Penang State Director as well as other officers (both executives and non-executives) namely Zolkiple Mat Yusof, Md Kismadi Ishak, Norhisham Kamarudin, Norazman Md Anuar and Saipol Baris. SSM's investigations revealed that these individuals were involved in a syndicate which alters the information in SSM's database for the purpose of procuring loans from banks. While the case has been forwarded for further investigation by the police, no action was taken against them with regard to the issuance of show cause letters or the initiation of any domestic inquiries. We are baffled by this development as the law certainly treats domestic inquiries and criminal investigations as being separate cause of action. For example, recently the MACC officers who committed robbery were subjected to both criminal prosecution and domestic inquiry, apart from being transferred immediately to desk jobs. 5 officers were placed in the SSM Training Academy while Roslan Hussain was placed in the CRD. It is common knowledge that Roslan Hussain and Amir Ahmad, the Director of CRD are close associates. Puan Zahrah Fenner and Amir Ahmad had advised Dato' Azmi Ariffin to merely transfer such officers. This is because Roslan Hussain had earlier threatened to expose everything in the event he is prosecuted. As such, it is in the interest of Puan

Zahrah Fenner and Amir Ahmad to keep the matter under wrap. Looking at the seriousness of the allegation, more drastic action should have been taken with immediate effect apart from simple transfers. The allegation would affect SSM's and the Government's integrity system and adversely affect the public's trust onto SSM as a custodian of corporate information.

7. Another disturbing rumour involves a high-level conspiracy to oust Datuk Redzuan Abdullah from his position as Senior Director, Enforcement. We were made to understand by Datuk Redzuan Abdullah that one of the Commission Members had gone to see Tan Sri Attorney General and alleged that Datuk Redzuan Abdullah had failed to carry out his functions in SSM. The Attoney General became furious and issued an instructions for all its secondees to be recalled. Apart from the Commission Member, the conspiracy also involved Khuzairi Yahaya and Amir Ahmad. In fact, a few days before the news pertaining to the meeting between the Commission Member and Tan Sri Attorney General took place, Khuzairi Yahaya approached Datuk Redzuan Abdullah and told him that he will soon be recalled to the Attorney General's Chambers. Datuk Redzuan Abdullah had related to us that the reason why that particular Commission Member wanted him out is to enable him to obtain access to SSM's investigation papers. Datuk Redzuan Abdullah also related that a few of the SSM enforcement officers had briefed the particular Commission Member on the progress of investigations of several cases.

8. We would like to urge the Commission Members to look into these allegations seriously. If true, they could undermine the integrity of the organization and the Government. The rakyat will no longer see SSM and the Government as a respectable institution. The various allegations cited above as well the propensity of the conspiracy is highly disturbing. If not managed well, this could result in a national scandal. With the general election just around the corner, we fear that such scandal would affect the Government's performance in the upcoming general election.

9. The choice for SSM's leadership is crucial to enable the organization to assist the Government's agenda towards achieving the state of a fully developed high income nation. The individual selected, apart from possessing the necessary knowledge and leadership quality, should also possess a high degree of integrity. We would like to suggest for the following action be taken:

> [95] To engage an independent auditor to conduct an urgent investigation and assessment on the state of SSM's organizational governance;
>
> [95] To engage the office of the Auditor General and MACC to conduct audit and investigation on the above matters;
>
> [95] To immediately suspend Puan Zahrah Fenner, Khuzairi Yahaya and Amir Ahmad pending the outcome of the investigation. They must also not be allowed to remain in the office premises or remain in contact with several key staff especially Puan Zarina Abdul Samad, Puan Samsiah Ibrahim and En Aziz Mamat. These are the key officers who can assist substantially in the investigation and provide the necessary facts. Puan Zahrah Fenner and Amir Ahmad had substantially relied on these officers to assist them in numerous misdeeds which include false accounting

entries and misrepresentations. It is highly recommended that these individuals be also interviewed by the police and MACC to assist their investigation. Much of the required evidence resides in Amir Ahmad's CRD and controlled by Puan Zahrah Fenner;

[95] A committee be formed by the Commission Members to recommend several qualified individuals to be considered by the Honourable Minister to occupy the post of CEO of SSM. An objective assessment of the candidates must be carried out in order to bring a new dimension to the organization; and

[95] An organizational restructuring be carried out, which will also entail the amendments to the CCM Act 2001 to strengthen institutional governance and integrity;

We humbly submit that the allegations cited above are extremely serious. We have no option in this regard but to relate ail the above to the Commission Members for further action to be taken. Swift action must be taken as there exist clear and present danger for documents to be concocted and evidence to be dissipated, in this regard, the Commission Members must achieve bold decisions. We stand ready to be called at anytime should the Commission Members require our assistance with regard to this matter.

In coming up with this letter, we are putting our career, reputation and even our lives (together with that of our family members) to be at stake. However, we sincerely believe in disclosing all that is contained in the letter in the interest of the Government as well as the public at large. As such, we plead that the readers of this letter to look into the allegations very very seriously. The mere existence of documents or permission from Dato' Azmi Ariffin in relation to the various allegations stated should be taken with extreme scepticism. This is not a straightforward case but with diligence, dedication and tireless effort, we are confident that the truth can be extracted.

We have tirelessly advocate the importance of corporate governance to our stakeholders in various seminars, training programmes and engagement sessions. In making this disclosure about the existing state of affairs in SSM, we are very ashamed that the level of corporate governance and integrity in SSM can be said to be highly questionable. We believe in walking the talk and for the level of corporate governance in Malaysia to be enhanced, the institutions which promotes and enforces it must be better off than its stakeholders.

Despite the negative perception and scepticism by a large number of individuals against the Government nowadays, we still have faith that there are still more than a few good men (and women) out there who are not afraid to carry out their respective responsibilities. We are aware of the consequence of such disclosure but in doing so, we submit ourselves to the will of Allah S.W.T. We pray that the readers of this letter will also be guided by Allah in dispensing their respective responsibilities and take the necessary action.

Thank you.

Regards,

.....	.....
Azryain bin Borhan	Hjh Rokiah binti Mhd Noor
Director,	Deputy CEO (Operations),
Companies Commission of Malaysia	Companies Commission of
Training Academy	Malaysia

[4] The first action that was taken by CCM regarding this letter is to discuss the same in a special commission's meeting on 19 December 2011. It was resolved in this meeting that CCM's Chief Executive Officer ('CEO') is to investigate the issues arising from the issuance of the letter. Investigation was carried out as directed and as a consequence the CEO issued a letter dated 2 March 2012 where it is found allegations in the letter written by both the applicants were unproven and the writing and issuance of the same is a serious breach of discipline.

[5] Accordingly thereafter the CEO appointed four members for the disciplinary secretariat ('DS') for the disciplinary proceedings ('DP1') against the applicants.

[6] On 5 March 2012 the DS issued a paper to the Disciplinary Committee (Special Cases) ('DC') on the issue whether both Applicants should be subjected for the DP under the 'serious punishment' category or the 'less serious punishment' category. The DC thereafter decided both should be considered for the serious punishment category pursuant to reg 33 of the Second Schedule of the Statutory Bodies (Discipline And Surcharge) Act 2000 ('SBA').

[7] On 5 April 2012 the DS issued two recommendation papers for the DC indicating there is a prima facie case against both applicants. The DC on the same date deliberated and agree that there is pursuant to reg 35(2) of the Second Schedule of the SBA a prima facie case against both applicants. The chairman of the DC then issued a letter dated 12 April 2012 stipulating the charges against the applicants pursuant to reg 35(2)(a) of the Second Schedule of the SBA.

[8] The two charges for Rokiah were as follows:

(a) PERTUDUHAN

Bahawa kamu, Hjh Rokiah binti Mhd Noor, No. KP 551205-03-5110, Timbalan Ketua Pegawai Eksekutlf (Operasi), semasa bertugas di Suruhanjaya Syarikat Malaysia (SSM) didapati telah *berkelakuan dengan sedemikian cara sehingga mencemarkan nama SSM* apabila kamu telah membuat sepucuk surat yang ditandatangani oleh kamu bertarikh 25hb Oktober 2011 bertajuk 'INTEGRITY AND LEADERSHIP CRISIS IN THE COMPANY COMMISSION

MALAYSIA' yang telah diedar kepada pihak ketiga termasuk YAB Dato' Sri Mohd Najib Tun Abdul Razak, Perdana Menteri Malaysia dan YAB Tan Sri Muhyiddin Mohd. Yassin, Timbalan Perdana Menteri Malaysia yang mana pernyataan-pernyataan di bawah yang terkandung di daiam surat tersebut telah mencemarkan nama dan imej SSM:

i. *Pakatan (Conspiracy)* – Perenggan 5 muka surat 4 surat tersebut ...

...

ii. *MYCOID* – Perenggan 5 (ii) muka surat 6 surat tersebut ...

...

iii. *Pakatan (Conspiracy)* – Perenggan 7 muka surat 10 surat tersebut ...

... (Emphasis added.)

Oleh yang demikian perlakuan kamu ini telah melanggar Peraturan 3(2)(d), Peraturan-Peraturan Tatatertib Badan-Badan Berkanun, Bahagian II, Jadual Kedua, Akta Badan-Badan Berkanun (Tatatertib dan Surcaj) 2000 ....

(b) PERTUDUHAN PILIHAN

Bahawa kamu, Hjh Rokiah binti Mhd Noor, No. KP 551205-03-5110, Timbalan Ketua Pegawai Eksekutif (Operasi), semasa bertugas di Suruhanjaya Syarikat Malaysia (SSM) didapati telah *berkelakuan tidak bertanggungjawab kepada SSM* apabila kamu telah membuat sepucuk surat yang ditandatangani oleh kamu bertarikh 25hb Oktober 2011 bertajuk 'INTEGRITY AND LEADERSHIP CRISIS IN THE COMPANY COMMISSION MALAYSIA' yang telah diedar kepada pihak ketiga termasuk YAB Dato' Sri Mohd Najib Tun Abdul Razak, Perdana Menteri Malaysia dan YAB Tan Sri Muhyiddin Mohd. Yassin, Timbalan Perdana Menteri Malaysia yang mana dakwaan-dakwaan yang terkandung di dalam surat tersebut adalah seperti berikut:

i. *Pakatan (Conspiracy)* – Perenggan 5 muka surat 4 surat tersebut ...

...

ii. *MYCOID* – Perenggan 5 (ii) muka surat 6 surat tersebut ...

...

iii. *Pakatan (Conspiracy)* – Perenggan 7 muka surat 10 surat tersebut ...

... (Emphasis added.)

Oleh yang demikian perlakuan kamu ini telah melanggar Peraturan 3(2)(g), Peraturan-Peraturan Tatatertib Badan-Badan Berkanun, Bahagian II, Jadual Kedua, Akta Badan-Badan Berkanun (Tatatertib dan Surcaj) 2000.

The two charges for Azryain were as follows:

(a) PERTUDUHAN

Bahawa kamu, En. Azryain bin Borhan No. KP 740401-04-5239, Pengarah Gred SSM59, Bahagian Akedemi Latihan, semasa bertugas di Suruhanjaya Syarikat Malaysia (SSM) didapati telah *berkelakuan dengan sedemikian cara sehingga mencemarkan nama SSM* apabila kamu telah membuat sepucuk surat yang ditandatangani oleh kamu bertarikh 25hb Oktober 2011 bertajuk 'INTEGRITY AND LEADERSHIP CRISIS IN THE COMPANY COMMISSION MALAYSIA' yang telah diedar kepada pihak ketiga termasuk YAB Dato' Sri Mohd Najib Tun Abdul Razak, Perdana Menteri Malaysia dan YAB Tan Sri Muhyiddin Mohd. Yassin, Timbalan Perdana Menteri Malaysia yang mana pernyataan-pernyataan di bawah yang terkandung di dalam surat tersebut telah mencemarkan nama dan imej CCM:

i. *Pakatan (Conspiracy)* – Perenggan 5 muka surat 4 surat tersebut ...

...

ii. *MYCOID* – Perenggan 5 (ii) muka surat 6 surat tersebut ...

...

iii. *Pakatan (Conspiracy)* – Perenggan 7 muka surat 10 surat tersebut ...

...

Oleh yang demikian perlakuan kamu ini telah melanggar Peraturan 3(2)(d), Peraturan-Peraturan Tatatertib Badan-Badan Berkanun, Bahagian II, Jadual Kedua, Akta Badan-Badan Berkanun (Tatatertib danSurcaj) 2000 ...

(b) PERTUDUHAN PILIHAN

Bahawa kamu En. Azryain bin Borhan No. KP 740401-04-5239, Pengarah Gred SSM59, Bahagian Akedemi Latihan, semasa bertugas di Suruhanjaya Syarikat Malaysia (SSM) didapati telah *berkelakuan tidak bertanggungjawab kepada SSM* dengan membuat dakwaan-dakwaan melalui sural bertarikh bertarikh 25hb Oktober 2011 yang ditandatangani oleh kamu bertajuk 'INTEGRITY AND LEADERSHIP CRISIS IN THE COMPANY COMMISSION MALAYSIA' yang telah diedar kepada pihak ketiga termasuk YAB Dato' Sri Mohd Najib Tun Abdul Razak, Perdana Menteri Malaysia dan YAB Tan Sri Muhyiddin Mohd. Yassin, Timbalan Perdana Menteri Malaysia yang mana dakwaan-dakwaan yang terkandung di dalam surat tersebut adalah seperti berikut:

i. *Pakatan (Conspiracy)* – Perenggan 5 muka surat 4 surat tersebut ...

...

ii. *MYCOID* – Perenggan 5 (ii) muka surat 6 surat tersebut ...

...

iii. *Pakatan (Conspiracy)* – Perenggan 7 muka surat 10 surat tersebut ...

...

Oleh yang demikian perlakuan kamu ini telah melanggar Peraturan 3(2)(g), Peraturan-Peraturan Tatatertib Badan-Badan Berkanun, Bahagian II, Jadual

Kedua, Akta Badan-Badan Berkanun (Tatatertib dan Surcaj) 2000. A

[9] This letter containing these charges also affords the applicants a written representation in answering the same. The applicants issued their respective written representations dated 24 May 2012. Based on these written representations, the DS issued two recommendation papers dated 13 June 2012 in respect of Rokiah and 11 June 2012 in respect of Azryain. B

[10] On 21 June 2012 the DC met to discuss the written representations of the applicants and decided the applicants' cases be referred to the investigation committee ('IC') for further clarification pursuant to reg 35(2) of the Second Schedule of the SBA. C

[11] Further a DC member decided to refuse himself from both the DCs as his name was mentioned in the written representations of both applicants. D

[12] The applicants were informed by letters dated 23 July 2012 that the DC had decided to refer their cases to the IC. By letters too dated 24 September 2012 they were notified that they are required to attend the IC's hearing on 27 September 2012, In the letters it was stated that the focus of hearing would be on the reasons why the applicants' letter dated 25 October 2011 was circulated to third parties. E

[13] The IC's hearing was conducted on 27 September 2012 and its findings were recorded to the effect the applicants were not able to justify why they had issued their letter dated 25 October 2011 to third parties. F

[14] On 19 October 2012 the DS issued two recommendation papers for the applicants to the DC in respect of the IC's report. The recommendation papers requested the DC to review the report of the IC and thereafter to decide whether the applicants had acted improperly in issuing their letter and also to decide the punishment for the applicants if they are found guilty. G

[15] Accordingly the DC met on 31 October 2012 and unanimously decided that Rokiah and Azryain are guilty of the all the relevant charges against both and recommended that Rokiah be dismissed and Azryain be demoted by one grade. H

[16] In the case of Rokiah, the Minister subsequently acting pursuant to s 11(1)(b) of the CCM Act agreed with the recommendations of the DC to dismiss Rokiah. I

[17] In the case of Azryain, the Chairman of the DC also had informed the

CEO of CCM of the findings and recommendations of the DC in respect of Azryain's case and the said chairman had his full written grounds of the DC for Azryain's case.

AZRYAIN'S APPEAL

[18] The CEO of CCM thereafter informed Azryain of the decision of the DC by a letter dated 9 November 2012 and Azryain having being so informed, appealed to the disciplinary appeals committee ('DAC') against that decision of the DC finding him guilty by his letter dated 30 November 2012.

[19] The DAC met on 8 January 2013 after members of the same were requested to attend the said meeting by a letter dated 4 January 2013. On this date too without waiting for the DAC to meet, Azryain on his own volition tendered his resignation.

[20] On the date set for its meeting ie 8 January 2013 the DAC decided to maintain the decision of the DC and informed Azryain of the decision by DAC by a letter to him dated 30 January 2013.

ROKIAH'S TERMINATION OF EMPLOYMENT

[21] The DC met on 28 November 2012 to decide the appropriate mode to terminate her employment after she was found guilty.

[22] The meeting concluded her appointment as Deputy Chief Executive Officer (Operations) was a promotion as a permanent staff. Therefore it was decided it would be appropriate if her employment would be terminated by the Minister pursuant to s 11 of the CCM Act. Accordingly the Minister then issued a letter dated 28 November 2012 to her terminating her contract of employment and revoking her appointment as Deputy Chief Executive Officer (Operations) with effect from 1 December 2012 pursuant to s 11 of the CCM Act. There is also a letter by CCM to Rokiah dated 28 November 2012 informing her of the Minister's decision.

CONTENTIONS OF THE APPLICANTS AND COURT'S FINDINGS

[23] There are several grounds relied by the applicants in support of their judicial review and it would be most convenient and appropriate for this court to state the decisions on these grounds immediately after each ground are highlighted. These grounds are as follows:

(a) Scope of judicial review

[24] The applicants contend that it is no longer acceptable that administrative actions be considered valid if only the process upon which those actions were taken are shown to have been fairly accorded to the those facing the actions. The legal principles and case law that decided it would be sufficient to merely give the right of hearing and ensuring adherence to the rules against bias is no longer justified to say judicial review of such actions cannot be allowed.

[25] I am in agreement with the submission of the of the applicants that gone are the days where administrative actions including disciplinary actions can only be meaningfully challenged if and only if it can be proven that the process upon which such actions were taken is flawed. The principle that the sufficiency of the evidence adduced for the disciplinary charges meted out should not be questioned is no longer good law. The process of the hearing and the evidence itself of such administrative actions are now on the contrary opened for the courts' close scrutiny. Both the process in arriving at the decision and the decision itself must be proven to be justified.

[26] Of course there are now numerous cases suggesting the development of the law in this regard. Alluding to most of these cases serve no practical purpose. Suffice for it to be pointed out that one such case by our own Federal Court which after all is binding on this court is the case of *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147 which has unequivocally decided following English cases that not only the process but the decision itself is now subjected to judicial review.

[27] However despite *R Rama Chandran* the Court of Appeal in the case of *Michael Lee Fook Wah v Minister of Human Resources Malaysia & Anor* [1998] 1 MLJ 305 decided:

> In an application for an order of certiorari, *the High Court is not sitting in its appellate jurisdiction* but in its supervisory jurisdiction. *The court is more concerned with the decision-making process and not the decision itself.* The court should not readily question the administrative decision of the first respondent as that is his absolute discretion. Furthermore, the law does not require the first respondent to refer every matter to the Industrial Court. Section 20(3) of the Act confers a discretion on the first respondent whether to refer a complaint to the Industrial Court or not, which will depend on the facts and circumstances of each case. *The court will only interfere when it can be shown that the discretion was exercised unlawfully*. A negative act, such as not referring the complaint to the Industrial Court, is equally an exercise of discretion. (Emphasis added.)

[28] Bearing in mind the high stake upon which the fate of the applicants would be determined here, I consider it would be more prudent and fair to adopt the more stringent requirement required by *R Rama Chandran* in order

to uphold a disciplinary action compared to the less onerous burden in *Michael Lee Fook Wah*.

[29] So much for the fundamental pillar of judicial review to be reiterated so as to assist this court as its goes along considering both the contentions of the applicants on the process of hearing and also of the evidence and substance of the decisions that have been handed to the same.

(b) Defective charges

[30] The first allegation by the applicants in this regard and what could be considered as challenging the process of arriving at the decisions is that the charges by CCM proffered against both of them are vague, prejudicial and defective. The applicants submit that the charges being the first initial steps towards the DP cannot be allowed to stand as the applicants could not be expected to appreciate these charges as the same is ambiguous.

[31] I have already alluded to the charges in this written ground and I could still not appreciate why these charges are said to be vague and ambiguous. As seen, the charges have more than sufficient particulars for the applicants to understand what they are facing and what they need to prepare in meeting the same. If one were to look at these charges one would find that the same detailed the alleged offence upon which the applicants are said to have committed. The reference to the applicants letter which is the subject matter of the case against the applicants is clearly stated in the charges. This reference to the letter makes the applicants sufficiently aware that the crux of the offence levelled against them relates to this letter. Therefore it is without basis to suggest that they could not appreciate the charges they are facing as the same is indeed not vague and ambiguous contrary to their contention.

(c) Elements of the charges

[32] It is ironical that the applicants had submitted that the charges were vague but went on to elaborate on the elements of the charges that according to them need to be proven for the disciplinary actions.

[33] They had contended that the elements are:

(a) disgracing CCM's name;

(b) in the alternative acting irresponsibly to CCM; and

(c) distributing the letter to third parties.

[34] Even taking into account the three elements as argued by the applicants themselves, I would say that these three elements are proven to the satisfaction of the DC.

[35] There can be little doubt that the allegations as stated in the letter not only are serious in its implications but the same also cast negative impression on CCM. Anyone reading the letter may not necessarily believe of what are mentioned in the same but certainly will entertain some doubts whether what are alleged are completely untrue. That action in writing the letter without according the right of reply to those accused in the same also means the applicants had acted irresponsibly to not only CCM per se but also to those that have been accused. There is also absolutely no reasons for the applicants to send the letter to third parties considering what are being alleged wholly relates only to the affairs of CCM. I therefore hold that these three elements even though raised by the applicants themselves, have been proven against them.

[36] Apart from what I have explained above, I also hold there is no reasons to say that these elements are not within the domain of the DC to decide. It had weigh the evidence required in respect of the charges against the applicants and had not been proven to have gone wrong in any manner whatsoever in its appreciation of not only the required evidence but also the rebuttal of the same.

[37] No doubt as submitted by the applicants themselves the letter they had written is not an anonymous letter and where they had taken responsibility in the writing of the same, but this wouid essential mean that is precisely why they should be equally responsible in facing the repercussions that ensued because of their intrepid but rash and unthoughtful action.

(d) Investigation on the letter

[38] It is contended by the applicants that there is no investigation to the allegations raised in the letter rendering the fact that the allegations remains true as alleged.

[39] With respect I am unable to accept this submission as it is in evidence that on 19 December 2011 CCM's Special Commission's meeting resolved that its CEO is to investigate the issues arising from the issuance of the letter. Investigation was indeed undertaken and as a result the CEO issued a letter dated 2 March 2012 where it is found allegations in the letter written by both the applicants were unproven. In this regard I find no reasons to disturb the determination of the CEO that the allegations contained in the applicants' letter were baseless and unfounded. The CEO as already done, is at liberty after due consideration to determine the outcome of the investigation. Further the CEO must be shown and proven to have totally disregarded the need for an

investigation on these allegations and in this respect, I do not find any concrete evidence this was indeed the case as submitted by the applicants.

[40] It is also untrue there was no investigation in respect of the allegations contained in the applicants' letter as on 21 June 2012 the DC met to discuss the written representations of the applicants and decided the applicants' cases be referred to IC. In fact the applicants were well aware of the investigation as the applicants were informed by letters dated 23 July 2012 that the DC had decided to refer their cases to the IC. They were in fact also informed by letters too dated 24 September 2012 that they were required to attend the IC's hearing on 27 September 2012. The IC's hearing was conducted on 27 September 2012 and its findings was recorded and indeed the IC prepared a report on its investigation.

[41] Further this evidence simply reiterates that it is completely untrue for the applicants to argue there was no investigation done in respect of their allegations as contained in their letter. The sufficiency of that investigation and the conclusion upon the same is the prerogative of the IC. Again there is no reason for this court to disturb the findings of that investigation as it was not proven and shown that the IC had completely gone wrong on its conclusion.

(e) Whistleblower Protection Act 2010

[42] The applicants also submitted both the Minister and CCM failed to take into account s 10(1) and 10(3) of the Whistleblower Protection Act 2010 ('the WPA') which respectively states:

> No person shall take detrimental action against a whistleblower or any person related to or associated with the whistleblower in reprisal for a disclosure of improper conduct.
>
> A person is deemed to take detrimental action against a whistleblower or any person related to or associated with the whistleblower if –
>
> (a) the person takes or threatens to take the detrimental action because –
>
> (i) a whistleblower has made a disclosure of improper conduct; or
>
> (ii) the person believes that a whistleblower has made or intends to make a disclosure of improper conduct;
>
> or
>
> (b) the person incites or permits another person to take or threaten to take the detrimental action for any reason under subparagraph (a)(i) or (ii).

[43] In this regard the applicants contended that they had written the letter only with the best interest of CCM in their minds and they only wanted that

actions be taken appropriately to redress their versions of the unhealthy and damaging events happening at their place of work. Instead it is most unfair, perverse and irrational for CCM and contrary to the provisions of the WPA that disciplinary action is taken against them. Such action is 'detrimental action against a whistleblower' contrary to the provision of s 10(3) of the WPA.

[44] With respect to this argument, if one were to look at the whole provisions of the WPA, one would realise the statute does not protect or absolve anyone from making or writing unfounded statements. Even the protection afforded by s 10 (1) or (3) of the WPA does not in any event mean that the whistleblower is granted a *carte blanche* to say whatever he or she wants. They are still subjected to the requirement of justifying cogently the truth of the statements made. The provisions as stated cannot protect the applicants from disciplinary proceedings being commenced against them under the circumstances of this case.

(f) There was no complaint against the applicants

[45] It is the contention also of the applicants that despite there being no complaint against them in respect of the letter they had written, the disciplinary proceeding had been instituted. The applicants in this regard are of the view that there must be complaints on what is alleged against them before action could be taken.

[46] First I find there is no reasons to insist that there must be formal or informal complaints before investigation or for the disciplinary proceedings to begin against the applicants. For disciplinary actions to be taken only when there is a complaint against the wrongdoers is not supported in law.

[47] Second the fact that the employer of the applicants ie CCM deems it fit for investigation to be carried out and thereafter to initiate disciplinary action is indeed a form of compiaint against the actions of the applicants in writing the letter. Complaints in this regard need not be in a specified manner such as in police reports. The substantial grievance arising from the issuance of the letter is already before CCM, so it is immaterial that a formal complaint must be lodged in justifying the disciplinary proceeding.

[48] That actions taken by the employer towards DP cannot in anyway mean that the same are flawed merely because there is no formal complaints against the applicants.

(g) Procedural unfairness

[49] The applicants also contended that there is procedural unfairness both by the Minister and CCM in the disciplinary actions against the applicants. In this regard it is said that there should have been reasons made by both in respect of the decisions that have been meted out against the applicants.

[50] On this contention, I find that both the Minister and CCM have no obligations in respect of giving reasons for their actions. The Minister has the power to appoint a Deputy CEO and to revoke the same under s 11(1)(b) of the CCM Act where it is states a Deputy CEO's appointment can be revoked 'without assigning any reason for the revocation'.

[51] in any event more than sufficient reasons were provided by the DC and IC in their written grounds for the decisions made.

(h) Conflict of interest

[52] It is also argued by the applicants there is conflict of interest as the CCM's CEO that complained against the applicants for the DP to be initiated had also been involved in the whole disciplinary process.

[53] First it must be realised that the complaint needs to be lodged by someone in the setup of the office of the applicants. There is a need to initiate the disciplinary process and in this regard it was the CEO who had lodged the complaint. The role taken by the CEO in this regard should not be doubted as the complaint became a basis for the DP to start. Anyone in CCM including the CEO could make the complaint as it is after all a matter that deserve serious investigation in respect of the issuance of the letter of the applicants.

[54] There is also no conflict of interest here as the CEO was not involved in the whole disciplinary process. There are various stages in the process of the whole DP and it is simply an exaggeration to say the CEO was involved in all the process of the same. He was not involved in the decision making process of the DC or the IC.

(i) Preliminary decision

[55] It is also contended by the applicants that as early as 19 November 2011 there was already a preliminary decision that CCM had made to the effect 'if necessary, for the best interest of the organisation, to remove both the Deputy CEO and other senior officers involved' although at that point of time the CEO had not made the complaint for the DP to begin.

[56] On this, I find there is a misapprehension of the facts by the applicants that this was indeed a 'decision'. What is merely done at that point of time by

CCM is to address its mind of the need to view the letter of the applicants as something serious and if the case is made out against the applicants the need to take appropriate actions not only against the two but also 'other seniors officers involved'. On that score, I am unable to accept any suggestions that CCM and the other respondents involved in the DP against the applicants had prejudged the case before the proper process of the DP was duly carried out. At that stage there was no decision made against the applicants.

(j) Composition of the committees

[57] The applicants aiso submitted that some members of the committees should not have been nominated to hold the positions in the committees as they are directly involved or implicated in the letter.

[58] However on this contention, I find in the case of one Datuk Idrus Harun, he had recused himself as the DC member and in the case of one Encik Muhammad Sufyan and one Encik Rezy Izwan Ramly as members of the DS, their alleged involvement with regard to the issuance of the letter had earlier being expunged by this court. So there is no evidence that they were involved in the writing and issuance of the letter for them now to be objected as being members of the DS. In any event they are not involved in the decision making process.

(k) Classification of the case

[59] The applicants also dispute the classification of their case as 'serious punishments' cases. It was contended that their case should not be categorised in this manner.

[60] I do not agree to this submission as the DC's Chairman acted within powers in accordance with reg 33(1) of the Second Schedule of the SBA that states:

> Where an officer is alleged to have committed a disciplinary offence –
>
> (a) the Chairman of the Disciplinary Committee appropriate to that officer; or
>
> (b) if there is more than one tier of Disciplinary Committee in respect of such officer, the Chairman of the Disciplinary Committee having the jurisdiction to impose a punishment other than dismissal or reduction in rank,
>
> Shall, before commencing any disciplinary proceeding in respect of the officer, consider and determine whether the disciplinary offence complained of is of a nature which warrants a punishment of dismissal or reduction in rank or a punishment lesser that dismissal or reduction in rank.

[61] Further the decision to categorise the case as such was made pursuant to the DS's paper dated 5 March 2012 to the DC on the request for the DC to categorise the case whether as 'serious punishment' or 'less serious punishment'. Therefore the DC had that power as well as duty to make the categorisation.

[62] I also find there is no duty that the categorisation of the case and its deliberation to categorise it, must be informed to the applicants. The DC has that right to make the categorisation without the need to inform the applicants as to why it had done so. After all in the sphere of criminal prosecution too, the prosecutor has the power to charge for a serious or lesser offence in his discretion without the need to explain his reasons.

(l) Prima facie case

[63] It also contended that when a prima facie case is established, it must be informed to the applicants. In this regard it was argued the result of the investigation that meant a prima facie case is established was not relayed to the applicants.

On this, I do not find that this contention could be sustained as the result of the investigation was indeed made known to both applicants. That conclusion of the investigation led the applicants to make their written representations. It is therefore untrue to suggest that they were kept in the dark as to the result of the investigation and a prima facie case being made out against them. They would not have been required to make their representations had there been no prima facie case established.

[64] Further the DC's is entitled to make the decision that there was a prima facie case against the applicants due to their involvement in 'menulis dan menandatangani surat dan membuat dakwaan tidak berasas'. As noted, the applicants admitted writing the letter. This is without doubt related to the charges preferred. Also the DC acted in accordance with reg 35 of the Second Schedule of the SBA in deciding that there was a prima facie case against the applicants as it considered the relevant evidence and the effects of the issuance of the letter.

(m) Punishments method

[65] The applicants also raised the issue of the punishments that were handed down against the applicants. The argument of the applicants here is that there should not have been different punishments for the applicants as they were charged for the same offence.

[66] I find there is absolute power to mete out the punishments of dismissal in the case of Rokiah and demotion in the case of Azryain. In the case of Rokiah, DC was entitled in its deliberation to recommend for dismissal as she was holding a much higher position in CCM and likewise it was entitled to recommend a much lesser punishment for Azryain as he was a junior officer as compared to Rokiah.

[67] The different positions held by both applicants at the place of their employment are matters within the purview of the DC to consider in suggesting the appropriate punishments. After all in the case of Rokiah, the Minister is empowered to dismiss her from the service of CCM. The minister in this regard is empowered to act under s 11 of the CCM Act which states:

> 11(1) The Chief Executive Officer and Directors
>
> (a) a person who is a qualified person as defined in the Legal Profession Act 1976 or who possesses relevant knowledge or experience in commercial or company matters to be the Chief Executive Officer of the Commission; and the Chief Executive Officer of the Commissioner; and
>
> (b) two persons, who shall be known as Directors, to be deputies to the Chief Executive Officer, On such terms and conditions as the Minister may determine, for the proper administration of this Act and the laws specified in the First Schedule, and may revoke the appointment of any person so appointed without assigning any reason for the revocation.

[68] On punishments too it is wise to take note that such punishments could not easily be disturbed as seen in *Zakaria bin Abdul Rahman v Ketua Polis Negara Malaysia & Anor* [2001] 3 MLJ 385 which states:

> It is not open to the court to interfere with the punishment imposed by the disciplinary authority as the disciplining of a public officer by his department head is part of the function of the executive branch of the government and any usurpation by a court will be viewed with something very much more than disfavour. A court intervenes only on the nature and manner of accusation against a public officer as distinct from a consequential punishment.

[69] Further the Court of Appeal in the case of *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 said:

> The correct test was to determine whether it was reasonable for the appellant's employers to dismiss him on those facts. When considering the reasonableness of what a reasonable employer would have done, the court (whether it be the High Court, Court of Appeal or, the Industrial Court) must not substitute its own views as to what was the appropriate penalty (for the employee's misconduct) for the view of the particular employer concerned.

[70] Apart from the issues highlighted as above by the applicants, on the

whole, it is worth to point out there are several principles of law that ought to be taken into account in deciding the judicial review filed by the applicants as follows:

(a) Technicalities

[71] In pursuing their case for the judicial review, the applicants have to some extent erroneously equate court procedure to disciplinary action including their contention on the issue whether a prima facie case is established. In this regard it would be wrong to require the standard, burden and procedure in court to be applied similarly for disciplinary action.

[72] On this, the Federal Court in the case of *Kerajaan Malaysia & Ors v Tay Chai Huat* [2012] 3 MLJ 149; [2012] 3 CLJ 577 explains the position of the law clearly in saying:

> In the instant appeal, I am of the view that the trial judge and the Court of Appeal did not properly appreciate the facts and the applicable law to arrive at a judicious decision. From my reading of the judgments of the trial judge and the Court of Appeal, the approach taken, with respect, was as if the matter was a criminal case wherein the provisions of the Criminal Procedure Code and the Evidence Act 1950 would seem to apply. This approach is erroneous. *It must be stressed that the courts cannot introduce technicalities of a court of law to the disciplinary authority. Further, courts do not normally regard it as their function to interfere with the findings of fact by the disciplinary authority.* In *R v Deputy Industrial Injuries Commissioner, ex p Moore* [1965] 1 QB 456, Diplock LJ said (at p 488):
>
> > These technical rules of evidence, however, form no part of the rules of natural justice. The requirement that a person exercising quasi-judicial functions must base his decision on evidence means no more than it must be based upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant ... *The supervisory jurisdiction of the High Court does not entitle it to usurp this responsibility and to substitute its own view for his.* (Emphasis added.)

(b) Statutory requirements

[73] As earlier explained, I am satisfied that the DP had proceeded in compliance with the relevant statutory requirements. These include the punishment against Rokiah where the minister acted under s 11 of the CCM Act and where the DC's Chairman acted within powers in accordance with reg 33(1) of the Second Scheduled of the SBA.

[74] As the statutory provisions have been complied with, this court cannot insist on behalf of the applicants that CCM go beyond these statutory requirements in the DP. This is illustrated in the Court of Appeal case of

Harbhajan Singh v Suruhanjaya Pasukan Polis Malaysia & Anor [2002] 3 MLJ 714; [2002] 4 CLJ 85 where it is said:

> We agree with the learned judge that there is no requirement in Chapter D of the 1980 General Orders, or for that matter, in any law, that such a decision must be communicated to the appellant We would like to reiterate what Jemuri Serjan CJ (Borneo), delivering the judgment of the Supreme Court, said in *Ghazi bin Mohd Sani v Mohd Haniff bin Omar, Ketua Polis Negara Malaysia & Anor* [1994] 2 MLJ 114; [1994] 2 CLJ 333, which was also referred to by the learned judge:
>
> > In dealing with Ch D of the 1980 General Orders we remind ourselves that we are dealing with Genera Orders that have legislative effect and we must guard ourselves against adding words into them which were never intended.
>
> We would add that, in dealing with tribunals like the Police Commission, we should also guard ourselves from turning them into a court of law trying a criminal case, which they were not, and was never intended to be.

(c) Application for mandamus

[75] Part of reliefs sought by the applicants is an order of mandamus that CCM be ordered to pay the applicants bonuses and increments for the years 2011–2013.

[76] On this claim there is no mandamus that could be granted since it is the discretion of the applicants' employer, CCM, whether to grant the same. When a body in this case CCM has a discretion to exercise, then it would not be opened for mandamus to be issued as illustrated by the House of Lords decision in *Padfield and Others v Minister of Agriculture Fisheries and Food and Others* [1968] 1 All ER 694 where it states:

> Before your Lordships it was in the first place submitted that the Appellants had a right to have their complaint referred to the Committee and that accordingly an Order of Mandamus should be directed to the Respondent positively commanding him to refer the complaint This contention was rejected by the Divisional Court and was not even advanced in the Court of Appeal. *I, also, would reject it. In my view the Respondent is endowed with a discretion. It is for him to decide whether to ask the Committee to report on any complaint made as to the operation of any Scheme made under the Act. A duty will only devolve upon the Committee 'if the Minister in any case so directs'*. (Emphasis added.)

(d) Allegation of bias

[77] There is also allegation of bias against the decisions made in the DP at various stages. There is a need to be reminded of the evidential burden of proving bias and in this regard i find the applicants have not satisfied the same. Indeed even an appearance of bias would not be sufficient if all relevant facts point to the conclusion that no alleged bias had affected these decisions as seen

in *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] 2 WLR 870 where it is said:

> ... despite the *appearance of bias the court is able to examine all the relevant material and satisfy itself that there was no danger of the alleged bias having in fact cause injustice,* the impugned decision will be allowed to stand. (Emphasis added.)

CONCLUSION

[78] Although I am in agreement with the applicants that not only the process of decision making in the DP is subject to scrutiny but also the decisions finding themselves guilty can also be challenged, I find that the applicants had run short in proving their case for judicial review,

[79] For all the reasons that have been adumbrated, I would therefore with respect dismiss the applicants' applications for judicial review.

Applications dismissed.

Reported by Kohila Nesan